

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chen v Bao*,
2023 BCSC 1459

Date: 20230823
Docket: S183050
Registry: Vancouver

Between:

Jian Dong Chen

Plaintiff

And

Yuan Xun Bao

Defendant

Before: The Honourable Justice Ahmad

Reasons for Judgment

Counsel for the plaintiff:

C. Wong

Counsel for the defendant:

G. Lee

Place and Date of Hearing:

Vancouver, B.C.
June 13, 2023

Place and Date of Judgment:

Vancouver, B.C.
August 23, 2023

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I. INTRODUCTION

[1] On this summary trial application the plaintiff, Jian Dong Chen, seeks an order that the defendant, Yun Xun Bao (“Mr. Bao Jr.”), holds a property located in Burnaby, British Columbia (the “Property”) in trust for him.

[2] Mr. Chen’s position is straightforward: he says that his transfer of the Property to Mr. Bao Jr. in May 2011 for no consideration invokes the presumption of resulting trust. In the case of a resulting trust, the onus is on Mr. Bao Jr. to demonstrate that Mr. Chen intended to gift the Property to him. Mr. Chen says Mr. Bao Jr. cannot do so. In the alternative, Mr. Chen bases his claim on unjust enrichment.

[3] Noting that a significant amount of pre-trial discovery has been conducted, including examinations for discovery of both parties and examinations of key witnesses, Mr. Chen argues that it is appropriate to determine what he characterizes as a “single-issue” matter by way of summary trial.

[4] Mr. Bao Jr. argues that Mr. Chen’s characterization of the issues is overly simplistic and does not accurately capture the fullness or complexity of either the facts or the law. Moreover, he argues that there are significant inconsistencies in almost all aspects of the evidence and credibility will be the core issue to be assessed at trial. On that basis, he argues that this matter is not suitable for determination by way of summary trial.

[5] Alternatively, if this matter can be determined summarily, Mr. Bao Jr. submits that neither the law nor the facts support a determination in Mr. Chen’s favour. Mr. Bao Jr. argues that because the transfer was effected through a third party, there can be no resulting trust in favour of Mr. Chen. In any event, Mr. Bao Jr. says that the evidence supports his version of the transfer, that is, that the transfer was not made gratuitously, but was made in satisfaction of a debt owed by a different third party to Mr. Bao Jr.’s father.

II. BACKGROUND

A. The Parties and Other Involved Individuals

[6] Other than Mr. Chen and Mr. Bao Jr., there are a number of other individuals who, depending on the parties' version of the events, are key players in the events giving rise to this action. Those witnesses include:

- a) Xiu Ying Wang, Mr. Chen's mother-in-law ("Mr. Chen's Mother-in-Law");
- b) Jun Bao ("Mr. Bao Sr."), Mr. Bao Jr.'s father;
- c) Fu Yuan Wang ("Mr. Wang"). Mr. Bao Sr. and Mr. Wang are related by marriage. Their wives are sisters. Mr. Wang is also a long-time friend of Mr. Chen's; and
- d) Yuyi Wang ("Lareina"), Mr. Wang's daughter (who I refer to in these reasons by her first name for convenience only, intending no disrespect).

[7] The materials filed on this application include the affidavits of Mr. Chen, Mr. Bao Jr., Mr. Bao Sr., and Lareina. In addition, Mr. Chen relies on excerpts from the examination for discovery of Mr. Bao Jr. and the pre-trial examinations of the non-parties, Mr. Bao Sr. and Mr. Wang.

[8] Mr. Chen, Mr. Bao Sr., and Mr. Wang gave their evidence through an interpreter.

[9] Mr. Chen's Mother-in-Law did not provide any evidence on this application.

B. The Evidence

[10] I have considered all of the evidence that was before me on this application. I have summarized only the most salient parts of that evidence below.

1. The Property Purchase

[11] On May 10, 2011, Mr. Chen's Mother-in-Law entered into an agreement (the "Purchase Agreement") to purchase the Property for \$628,800. Mr. Chen deposes

that he asked his mother-in-law to buy the Property “on [his] behalf” as he was not able to transfer the funds out of China in time for the closing. His mother-in-law had money available in a Canadian bank account.

[12] By written addendum dated May 18, 2011, the vendor and Mr. Chen’s Mother-in-Law agreed that Mr. Bao Jr’s name “will be used on title [to the Property]”.

[13] There is no dispute that at the time, Mr. Chen did not know Mr. Bao Jr. and that Mr. Bao Jr. did not provide any consideration for the transfer of the Property to him.

[14] The purchase of the Property closed on June 22, 2011, at which time Mr. Bao Jr. became the registered owner.

[15] Regarding the payment of the purchase price, Mr. Chen deposes as follows:

The entire purchase funds of \$628,800, along with adjustments, was provided by me through my mother-in-law’s bank account in the form of two bank drafts: one for the \$65,000 deposit, and a second bank draft for \$574,811.06.

[16] There is no documentary evidence to support Mr. Chen’s evidence that his mother-in-law purchased the Property “on [his] behalf” or that he provided the purchase price “through [his] mother-in-law’s bank account”. As noted, Mr. Chen’s Mother-in-Law did not provide any evidence regarding her involvement in the transaction.

2. The Reason for the Property Transfer to Mr. Bao Jr.

Mr. Chen’s Evidence

[17] Mr. Chen deposes that in approximately April 2011, he started entertaining ideas about investing in a property in Canada. On the recommendation of his old friend Mr. Wang, Mr. Chen sought out the assistance of Mr. Bao Sr. who worked in real estate in the Vancouver area. After viewing the Property once and considering Mr. Bao Sr.’s recommendations, he decided to purchase the Property “for [his] investment purposes”.

[18] He says that Mr. Bao Sr. advised him that for tax reasons, the Property should be registered under the name of a Canadian resident who does not already own property. As neither he (who owned a residence in Langara) nor his mother-in-law (who was “only visiting Canada”) fulfilled that criteria, Mr. Bao Sr. recommended that the Property be registered under his son, Mr. Bao Jr.’s, name. Mr. Chen accepted that recommendation.

[19] There is no documentary evidence reflecting that recommendation.

Mr. Bao Sr.’s Evidence

[20] Mr. Bao Sr.’s version of the reason for the transfer to Mr. Bao Jr. is different. In brief, he says that Mr. Chen caused the Property to be transferred to Mr. Bao Jr. as Mr. Wang’s agent in satisfaction of a debt owed by Mr. Wang to Mr. Bao Sr.

[21] More specifically, Mr. Bao Sr. alleges that Mr. Wang was indebted to him in relation to previous business dealings, and for Mr. Wang’s share of the cost of the home that Mr. Bao Sr. and his wife transferred to his wife’s parents. As noted, Mr. Bao Sr. and Mr. Wang are related by marriage – Mr. Bao Sr.’s parents-in-law are also Mr. Wang’s in-laws.

[22] Mr. Bao Sr. says that in 2010, Mr. Wang agreed that he would repay the debt by buying a property in Vancouver as a wedding gift for Mr. Bao Jr. However, due to the limits on the amount of funds that he could transfer out of China, Mr. Wang told him that Mr. Chen would help him acquire the property in Vancouver. He suggested that Mr. Bao Sr. should contact Mr. Chen directly to discuss the transfer.

[23] Mr. Bao Sr. says that he viewed several properties and he, not Mr. Chen, decided on the Property.

[24] He says that together he and Mr. Wang drafted what he refers to as a “gift note” (the “Gift Note”) to verify the source of the funds transferred to Canada from China and that would allow him to report taxes concerning the gift. He deposes that, given his government position in China, Mr. Wang did not want to attract an

investigation if the government found out that he had transferred 4 million RBM overseas. Accordingly, given Mr. Chen's involvement, they agreed to use Mr. Chen's name on the Gift Note.

[25] The English translation of the Gift Note, which was prepared in Chinese and appears to be signed by "Chen Jiangdong", provides as follows:

I would like to pay for the entirety of the amount your son [Mr. Bao Jr.] needs to purchase the [Property] in Canada to repay your lending to [Mr. Wang's] parents-in-law to purchase a property in Shanghai, and please settle the tax declaration for this payment in Canada by yourself. All rights to the property shall belong to your son. Besides, please provide a quieter learning and living environment for [Mr. Wang's] daughter when she studies in Canada.

[26] Each of Mr. Chen and Mr. Bao Jr. retained a handwriting expert to determine if the signature on the Gift Note matched Mr. Chen's signature. One report concluded that Mr. Chen "probably wrote" the signature, and the other concluded that there was a "probability" that he did so.

[27] Mr. Chen and Mr. Wang deny all aspects of Mr. Bao's evidence regarding the reason for the transfer. In particular: (a) Mr. Wang denies that he owed any money to Mr. Bao Sr.; (b) Mr. Wang and Mr. Chen deny that Mr. Chen acted as an agent for Mr. Wang, or that the Property was transferred as a gift or loan repayment to Mr. Bao Sr.; (c) Mr. Wang denies preparing the Gift Note with Mr. Bao Sr.; and (d) Mr. Chen denies signing the Gift Note.

3. Use, Upkeep, and Maintenance for the Property

Mr. Chen's Evidence

[28] After closing, Mr. Chen says he gave Mr. Bao Sr. \$100,000 to cover the cost of renovations, maintenance, strata fees, and property taxes. On learning that money ran out, he provided annual payments of \$10,000 to Mr. Bao Sr. through Mr. Wang's daughter, Lareina, who was then living at the Property.

[29] Lareina deposes that she received from her parents a total of \$50,000 cash over the course of five years to give to Mr. Bao Jr.'s parents. She understood from

her parents that those payments were made by Mr. Chen to cover the costs of the Property.

[30] No documentary evidence was produced in respect of those payments.

Mr. Bao Sr.’s Evidence

[31] Mr. Bao Sr. confirms that Lareina stayed at the Property. He says that due to the rental restrictions imposed by the strata council, he advised council that she was his daughter. That was not, in fact, the case.

[32] He denies that he received any cash from Mr. Chen or Lareina. He deposes that he, not Mr. Chen, paid for all the maintenance, property taxes, strata fees, and other expenses associated with the Property. He produced utility bills, property tax notifies, and bank statements indicating that he did so.

4. Events Leading up to the Action

[33] In approximately 2017, a dispute occurred between Mr. Wang’s family and Mr. Bao Sr.’s family. As a result of that dispute, in late 2017 or early 2018, Mr. Bao Sr. said that he forced Lareina to move out of the Property.

[34] Having learned of the family dispute, Mr. Chen says that he decided to list the Property for sale. He says, “to [his] surprise”, Mr. Bao Sr. then claimed that the Property belonged to Mr. Bao Jr.

[35] This action was commenced in February 2018. It is set for a 10-day trial commencing on April 29, 2024.

III. ISSUES

[36] The two main issues to be determined on this summary trial application are as follows:

- a) Is the matter suitable for determination by way of summary trial?
- b) If so, does Mr. Bao Jr. hold the Property in trust for Mr. Chen?

IV. LEGAL FRAMEWORK

A. Suitability for Determination by Way of Summary Trial

[37] Pursuant to Rule 9-7(15)(a) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, on the hearing of summary trial application, the court may grant judgment in favour of any party, either on an issue, or generally, unless:

- (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
- (ii) the court is of the opinion that it would be unjust to decide the issues on the application.

[38] It has long been established that conflicts in evidence alone is not a basis for the court to decline to grant summary judgment where other admissible evidence makes it possible to find the facts necessary for judgment to be given. However, courts have emphasised that a summary trial judge should not decide an issue of fact or law solely on the basis of conflicting affidavits, even if they prefer one version to the other: *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*, 1989 CanLII 229 (B.C.C.A.), 36 B.C.L.R. (2d) 202 [*Inspiration Management*].

[39] However, even if on the whole of the evidence, it is possible to find the necessary facts, it may be unjust to decide a case summarily: *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 30. There are a number of factors that will inform the analysis of whether a summary trial is unjust: *Gichuru* at paras. 30–31, citing *Inspiration Management*, and others. Of those, the most significant in the present case include: the amount involved, the prejudice (or lack of prejudice) likely to arise by reason of delay, the course of proceedings, and whether credibility is a crucial factor in determining the dispute.

B. Resulting Trust and Constructive Trust

[40] Mr. Chen claims that both the presumption of resulting trust and the principles of unjust enrichment apply such that he is entitled to a beneficial interest in the Property. In determining whether this matter is suitable for determination for

summary trial, I must consider whether the evidence makes it possible to find the facts necessary to support those claims.

[41] As a starting point, the presumption of indefeasibility of title provides that where legal title is registered to an owner, the property is presumed to belong to that owner both legally and beneficially. The presumption is codified in the *Land Title Act*, R.S.B.C. 1996, c. 250, s. 23(2). However, the presumption of indefeasible title can be rebutted, including through the operation of a resulting trust or taking into account the underlying equitable interests between the parties, such as in claims of unjust enrichment: *Suen v. Suen*, 2013 BCCA 313 at para. 34.

[42] The presumption of resulting trust is engaged where an owner of property has gratuitously transferred title of property to another person. In that case, the law generally presumes that the person who made the transfer of property intended a trust, not a gift, and the recipient person who gave no value for the property is under an obligation to return the property to the original title owner: *Pecore v. Pecore*, 2007 SCC 17 at para. 20; *Kerr v. Baranow*, 2011 SCC 10 at para. 19.

[43] Where a transfer is made gratuitously, a resulting trust is presumed. The onus is on the party seeking to rebut that presumption to prove that the transferor intended a gift. The evidentiary focus is on the transferors' actual intention at or around the time of the transfer: *Suen* at paras. 35–38; *Kerr* at paras. 17–19.

[44] The elements of an unjust enrichment claim are well established: (a) an enrichment to the defendant; (b) a corresponding deprivation to the plaintiff; and (c) the absence of any juristic reason for the enrichment: *Kerr* at para. 32.

[45] As the Court explained in *Kerr*, the Supreme Court of Canada “has taken a straightforward economic approach to the first two elements...”: at para. 37. Although not a closed list, juristic reasons to deny recovery include the intention to make a gift, a contract, or a disposition of law: *Kerr* at paras. 37–41.

V. DISCUSSION AND ANALYSIS

[46] As a threshold issue in the action, Mr. Bao Jr. says that Mr. Chen never owned the Property, nor did he provide the funds with which the Property was purchased. Rather, he says, as documented on the Purchase Contract, Mr. Chen's Mother-in-Law transferred her interest in the Property to Mr. Bao Jr. On that basis, Mr. Bao Jr. argues that Mr. Chen did not transfer the Property so as to give rise to a claim for resulting trust.¹

[47] Alternatively, and in any event, he argues that the Property was transferred to him in satisfaction of the debt owed to his father by Mr. Wang. In other words, it was not transferred to him gratuitously so as to invoke the presumption of resulting trust.²

[48] Those submissions give rise to the following issues:

- a) Did Mr. Chen have an interest in the Property to transfer to Mr. Bao Jr.;
and
- b) If so, what was Mr. Chen's intention in effecting the transfer of the Property to Mr. Bao Jr.?

[49] For this matter to be suitable for determination by way of summary trial, I must be able to find the facts necessary to determine both of those issues on the evidence that is before me.

[50] The only evidence regarding Mr. Chen's interest in the Property is Mr. Chen's own evidence that his mother-in-law purchased the Property "on [his] behalf" and that he provided the purchase money "through [his] mother-in-law's bank account". Although uncontroverted, that evidence is inconsistent with the facts he pleaded in the notice of civil claim. At paras. 4 and 5 of that pleading, Mr. Chen asserts:

¹ Mr. Bao Jr. did not advance the same argument with respect Mr. Chen's claim for a constructive trust.

² Mr. Bao Jr. did not advance any argument regarding the impact of his position that Mr. Chen did not gratuitously transfer the Property to Mr. Bao Jr. on Mr. Chen's claim for a constructive trust.

4. In or about June 2011, [Mr. Chen], with funding in the amount of approximately \$600,000 of [Mr. Chen's] own money directly from his bank account, purchased [the Property].
5. The approximate amount of \$600,000 provided by [Mr. Chen] covered the entire purchase price of the Property.

[My emphasis.]

[51] Even assuming, without deciding, that Mr. Chen's uncontroverted evidence establishes his interest in the Property, the inconsistency between his pleaded facts and his evidence gives rise to an issue of credibility. There being no other evidence that the purchase was made "on his behalf" – for example, evidence from Mr. Chen's Mother-in-Law or other documentation regarding the purchase – there is nothing to support an assessment of his credibility on this issue.

[52] The evidence regarding the second issue – Mr. Chen's actual intention at the time of the transfer – directly and irreconcilably conflicts. As summarized above, Mr. Bao Sr. says that the transfer was not made gratuitously, but was effected by Mr. Chen as the agent for Mr. Wang in satisfaction of an outstanding debt. On the other hand, Mr. Chen maintains that he purchased the Property as an investment and effected the transfer of the Property to Mr. Bao Jr. solely for tax reasons. Both expressly deny the other's version of the events.

[53] The differences are so diametrically opposed such that accepting one not only means not accepting the other, but requires concluding that either Mr. Chen or Mr. Bao Sr. (and perhaps Mr. Wang) has deliberately fabricated their version of the events. Ultimately, the outcome of this action will likely be determined solely on the assessment of credibility of those main witnesses.

[54] In my view, none of the other evidence does anything to definitively support or disaffirm either version of the circumstances surrounding the transfer.

[55] Mr. Chen argues that his version is supported by his payments to cover Property expenses, which he says are indicative of his interest in the Property. Although Lareina deposes that she provided payments totaling \$50,000 to Mr. Bao Jr.'s parents, she had no first hand knowledge of the source of those funds or the

purpose of those payments. Her evidence that Mr. Chen provided the monies for expenses relating to the Property is hearsay and inadmissible on this summary trial application. It is also inconsistent with evidence she gave at her pre-trial examination.

[56] Lareina's admissible evidence (i.e., that she received and handed cash to Mr. Bao Jr.'s parents) only minimally corroborates Mr. Chen's evidence. Mr. Bao Sr.'s denial that he received any funds from Lareina creates even further conflicts in the evidence. There is no documentary evidence to assist in resolving the conflict on this point.

[57] For his part, Mr. Bao Sr. relies primarily on the Gift Note, the authenticity of which is denied by both Mr. Chen and Mr. Wang. While the two experts do not exclude Mr. Chen as having signed the note, neither definitively conclude that he did. While the burden of proof does not require conclusive evidence, in my view, given the significant discrepancies in the evidence, the experts' equivocal evidence regarding the Gift Note is not by itself enough to find the facts necessary in this summary manner.

[58] Having reviewed all of the material filed in support of the parties' positions (only some of which I have discussed), the following are some general observations with respect to the evidence:

- a) With the exception of the Gift Note, very little documentary evidence exists or has been produced. In particular, neither party has produced any written documents, such as contemporaneous communications recording or evidencing the arrangements they allege gave rise to the transfer of the Property to Mr. Bao Jr.;
- b) Even apart from the conflict in Mr. Chen and Mr. Bao Sr.'s evidence, the evidence of the other witnesses conflicts. Indeed, with the exception of Mr. Bao Jr.'s legal ownership of the Property and Lareina's tenancy at the Property, virtually all of the evidence is in dispute;

- c) Given the family dispute between the Bao family and the Wang family, none of non-expert witnesses are independent; and
- d) Neither Mr. Chen's nor Mr. Bao Sr.'s credibility is completely untarnished: Mr. Chen by, among other things, the inconsistency between his pleadings and his evidence regarding the source of funds for the purchase of the Property; and Mr. Bao Sr. by the creation of the Gift Note and his advice to the strata council that Lareina was his daughter, neither of which reflected what he understood to be the truth.

[59] Based on the above, I easily conclude that this is not a case in which I can properly assess the credibility of the main witnesses or otherwise find the facts necessary to resolve the issues in the action.

[60] In coming to that conclusion, I have considered that many of the witnesses, including Mr. Chen and Mr. Bao Sr., will give their evidence at trial through an interpreter. That was a factor that informed the court's decision in *Wei v. Mei*, 2018 BCSC 157 to allow a matter to proceed by summary trial. The Court observed:

[9] ...a judge who does not speak Mandarin, and receives the evidence of Mandarin-speaking witnesses only through an interpreter, loses, for the most part, the ability to assess credibility based on demeanour. No matter how capable an interpreter may be, a judge receiving interpreted evidence is receiving it second-hand. Cross-examination, the so-called engine for getting at the truth, is inhibited substantially when it is conducted through an interpreter. It usually amounts to not much more than the equivalent of written questions and written answers, allowing little room for credibility to be assessed. Courts have cautioned that a trier of fact should not rely too much on the assessment of credibility based on demeanour. See for example, *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.); and *Pacheco v. Antunovich*, 2015 BCCA 100. I simply observe that whatever value such assessments do bring to the fact-finding exercise is largely eroded when the testimony needs to come in through an interpreter.

[61] Given the number of witnesses who will be giving evidence through an interpreter in this case, Mr. Chen argues that *Wei* is apposite and dictates that this matter, too, can be determined on a summary basis. I disagree.

[62] Firstly, in *Wei*, other evidence was available to the summary trial judge to allow him to assess credibility. As the summary trial judge concluded in that case, the disputed evidence could be resolved “in nearly every instance by testing them against objective evidence”: at para. 10. In my view, the case is easily distinguishable on that basis alone.

[63] Secondly, the issue raised in *Wei* applies only to assessments based on demeanour. It does not diminish other ways in which examinations, including direct and cross-examinations, can assist in assessing credibility. For example, oral examinations will allow counsel to test the firmness of the witnesses’ memory and will reveal whether a witness changes their testimony between direct and cross. Both are factors identified in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186 as being relevant to a credibility assessment.

[64] In addition, other than the affidavits, both parties rely on excerpts of discovery transcripts and pre-trial examinations of the non-parties. Relying on those sources as evidence has its limitation. As noted in *Newhouse v. Garland*, 2022 BCCA 276 at para. 92: “Although discovery evidence is admissible on a summary trial application, and can be an important source of admissions, the selective and fragmented use of discovery testimony otherwise makes it of limited value [citations omitted]”. The same observation can be made with respect to the pre-trial examinations of witnesses.

[65] In my view, the Court will benefit from the further testing of the evidence by way of oral examination of the witnesses which will both: (a) provide the court with better tools to assess the credibility of the witnesses; and (b) provide a more complete picture of the evidence than excerpts of the discovery and pre-trial examinations can provide. Without the additional tools that a more fulsome examination of the witnesses will provide, I am unable on this summary trial application to assess the credibility of the main witnesses or otherwise find the facts necessary to decide the issues of fact or law to be determined.

[66] Moreover, even if I was able to find the find the facts necessary to determine this dispute, several factors dictate that it would be unjust to do so. In that regard, I note:

- a) The credibility of the two main witnesses, Mr. Chen and Mr. Bao Sr., is a crucial, if not sole, factor in determining the dispute;
- b) The Property was purchased in 2011 for approximately \$630,000. The 2023 BC Assessment value of the Property is \$957,000. The amount at stake in this action appears to warrant the cost of taking the case forward to a conventional trial;
- c) The matter is scheduled for a conventional trial in April 2024. While not imminent, that trial date provides some comfort that this matter can be determined in the relatively near future; and
- d) In event, there is no suggestion that any prejudice will arise by reason of the nine-month delay in having the matter heard.

VI. CONCLUSION AND DISPOSITION

[67] As I have concluded above, I am unable, on this summary trial application to find the facts necessary to decide the issues of fact or law to be determined. I have also concluded that even if I could decide those facts, it would be unjust to do so.

[68] I am mindful that notwithstanding those conclusions, I am not required to remit this case to the trial list if I find that it may be possible for the Court to find the facts necessary to give judgment by employing any of the procedures allowed by Rule 9-7(12), including cross-examinations on affidavits: *Inspiration Management* at paras. 57 and 64.

[69] However, in this case, given the significant conflicts in almost all aspects of the evidence and amongst almost all of the witnesses, I am unable to conclude that cross-examination on the affidavits alone will assist the court in finding the facts

necessary to resolve the dispute without the more fulsome examinations that can be conducted at a full trial.

[70] The application for judgment pursuant to Rule 9-7 is dismissed.

VII. COSTS

[71] Costs of this application are awarded to Mr. Bao Jr. in the cause.

“Ahmad J.”